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No. 03-472

In the Supreme Court of the United States

CENTER FOR NATIONAL SECURITY STUDIES, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Department of Justice properly withheld under the Freedom of Information Act, 5 U.S.C. 552, the identities and related information of individuals interviewed and subsequently detained in an ongoing law enforcement investigation.

2. Whether the First Amendment creates a right of access to governmental records identifying individuals who have been questioned and detained as part of an ongoing law enforcement investigation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
1. The court of appeals applied settled principles of law under FOIA Exemption 7(A)	10
2. The court of appeals correctly upheld withholding of the particular records at issue	15
3. Petitioners' First Amendment claim does not merit review	21
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Serv. Co. v. *EPA*, 856 F.2d 309 (D.C. Cir. 1988)	14
Burge v. *Eastburn*, 934 F.2d 577 (5th Cir. 1991)	20
CIA v. *Sims*, 471 U.S. 159 (1985)	2, 17, 21
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948)	17
Crooker v. *Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64 (D.C. Cir. 1986)	14-5
Curran v. *Department of Justice*, 813 F.2d 473 (1st Cir. 1987)	14
Department of Justice v. *Julian*, 486 U.S. 1 (1988)	2
Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)	14
Detroit Free Press v. *Ashcroft*, 303 F.3d 681 (6th Cir. 2002)	22
Fitzgibbon v. *CIA*, 911 F.2d 755 (D.C. Cir. 1990)	20
Fund for Constitutional Gov't v. *National Archives & Records Serv.*, 656 F.2d 856 (D.C. Cir. 1981)	6

Cases—Continued: Page

Houchins v. *KQED, Inc.*, 438 U.S. 1 (1978) 21
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989) 2
Landano v. *Department of Justice*, 956 F.2d 422 (3d Cir. 1992), vacated on other grounds, 508 U.S. 165 (1993) 20
Los Angeles Police Dep't v. *United Reporting Publ'g Co.*, 528 U.S. 32 (1999) 21-22
Manna v. *Department of Justice*, 51 F.3d 1158 (3d Cir.), cert. denied, 516 U.S. 975 (1995) 12, 14, 15, 20
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) 2, 12, 13
Neely v. *FBI*, 208 F.3d 461 (4th Cir. 2000) 20
North Jersey Media Group v. *Ashcroft*, 123 S. Ct. 215 (2003) 22
Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 22
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 22
Weinberger v. *Catholic Action*, 454 U.S. 139 (1981) 2
Zadvydas v. *Davis*, 533 U.S. 678 (2001) 9, 17

Constitution, statutes and rule:

U.S. Const. Amend. I 8, 10, 21, 22
Act of July 30, 1997, Pub. L. No. 95-78, § 2(a), 91 Stat. 319 6
Authorization for Use of Military Force, Pub. L. No. 107-40, preamble, 115 Stat. 224 3
Freedom of Information Act:
5 U.S.C. 552 2
5 U.S.C. 552(b)(1) 8, 16
5 U.S.C. 552(b)(3) 6, 8, 16
5 U.S.C. 552(b)(7) 5, 7
5 U.S.C. 552(b)(7)(A) ..... *passim*

Statutes and rule—Continued: Page

5 U.S.C. 552(b)(7)(C) 5, 8, 14, 15, 19, 20
5 U.S.C. 552(b)(7)(F) 5, 8, 15, 19, 20
Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48 13
18 U.S.C. 3144 4
Fed. R. Crim. P. 6(e) 6

Miscellaneous:

Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens held on Immigration Charges In Connection with the Investigation of the September 11 Attacks* (Apr. 2003) 11
S. Rep. No. 221, 98th Cong., 1st Ssess. (1983) 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 331 F.3d 918. The opinion of the district court (Pet. App. 64a-101a) is reported at 215 F. Supp. 2d 94.

JURISDICTION

The court of appeals entered its judgment on June 17, 2003. On September 9, 2003, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 29, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552, Congress attempted "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for "broad disclosure of Government records," Congress also "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Department of Justice* v. *Julian*, 486 U.S. 1, 8 (1988) (quotation marks omitted). Because "public disclosure is not always in the public interest," Congress "provided that agency records may be withheld" if they fall within one of the Act's nine exemptions. *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). Those exemptions "are intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

One such exemption is Exemption 7(A), which permits the withholding of "records or information compiled for law enforcement purposes" if their "production * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). Unlike other FOIA exemptions, Exemption 7(A) may be invoked without detailed identification or analysis of the individual documents. Rather, it is a categorical exemption that broadly protects types and classes of documents from disclosure if the government demonstrates that their production could reasonably be expected to hamper civil or criminal enforcement proceedings. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 236 (1978).

2. On September 11, 2001, the al Qaeda terrorist network attacked the United States, murdering thou-

sands of innocent civilians. In response, Congress affirmed the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, preamble, 115 Stat. 224. Congress also specifically found that terrorists "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." *Ibid.*

The President promptly ordered "an extensive, broad based and world-wide investigation into those terrorist attacks and into threats, conspiracies, and attempts to perpetrate terrorist acts against United States citizens and interests," which included "an unprecedented worldwide effort to prevent further attacks by apprehending those responsible for the September 11 attacks and by detecting, disrupting, and dismantling terrorist organizations." Pet. App. 107a (Declaration of James S. Reynolds). The terrorism investigation is "open and ongoing." *Ibid.* The FBI and other law enforcement agencies are continuing to follow leads and conduct interviews at this time. *Ibid.*; see *id.* at 2a.

In the course of that investigation, the government interviewed and subsequently detained numerous individuals. Those individuals fall into three categories. The first category is persons who were questioned because evidence suggested that "they might have connections with, or possess information pertaining to, terrorist activity against the United States," and who subsequently were detained on immigration charges. Pet. App. 3a. With respect to some of those detainees, officials also determined that they may "have links to other facets of the investigation." *Ibid.* The (then) Immigration and Naturalization Service instituted removal proceedings against many of those aliens. Many

have been deported. Others have been released. The detainees have been and remain free to contact reporters and to disclose their identities to the public. *Id.* at 3a.

The second category of detainees consists of individuals held on federal criminal charges. Pet. App. 3a-4a. While the nature of the charges pending against each criminal detainee varies, until the investigation is concluded, none can be eliminated as a potential source of relevant or probative information. Each criminal defendant who so desires has been provided court-appointed counsel and has been allowed to contact the press and the public. *Id.* at 4a.

The third category consists of persons detained after a federal court issued a material witness warrant to secure their testimony before a grand jury, pursuant to 18 U.S.C. 3144. Pet. App. 4a. Each material witness detained was found by a federal district court to have information "material to the events of September 11." *Ibid.* To ensure the secrecy of grand jury proceedings, the district courts before which the witnesses have appeared have issued sealing orders that prohibit the government from releasing any information about those proceedings. Individuals detained on material witness warrants have been provided court-appointed counsel and have been allowed to contact reporters or the public, *ibid.*, unless to do so would violate a court's particular sealing order.

3. Petitioners submitted three FOIA requests to the Department of Justice, seeking information about the individuals arrested or detained in connection with the terrorism investigation. More particularly, the FOIA requests sought (1) the detainees' names and citizenship status; (2) the locations where they were arrested and detained; (3) the dates they were arrested, the

dates any charges were filed, and the dates they were released; (4) the nature of any charges filed against them or other bases for detaining them; (5) the names and addresses of any attorneys representing them; (6) the identities of any courts that have been asked to enter orders sealing proceedings in connection with the detainees, copies of those orders, and the legal authorities relied on by the government in seeking those orders; and (7) any policy directives or guidance issued to officials that pertain to making public statements or disclosures about the detained individuals. Pet. App. 4a-5a.

The government released a significant amount of information in response to the FOIA requests, but withheld other information on the ground that it fell within FOIA Exemptions 7(A), 7(C), and 7(F). Those exemptions permit the withholding of information "compiled for law enforcement purposes" if its production

> (A) could reasonably be expected to interfere with enforcement proceedings, * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, * * * or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. 552(b)(7).

With respect to the INS detainees, the government withheld the individuals' names, their locations of arrest and detention, the dates of their release, and the names of their lawyers. For the criminal detainees, the government withheld the dates and locations of their arrest and detention, the dates of their release, and their citizenship status. With respect to the material witnesses, the government withheld all requested infor-

mation based not only on the law enforcement exemptions, but also on FOIA Exemption 3, which applies to any information that is "specifically exempted from disclosure" by another statute, 5 U.S.C. 552(b)(3)—in this case, Federal Rule of Criminal Procedure 6(e), which restricts the release of information reflecting grand jury proceedings. Pet. App. 5a.[1]

4. Petitioners filed suit under FOIA to compel disclosure of the withheld information. In support of its withholding decision, the government submitted the declarations of two career officials with central responsibility for the ongoing terrorism investigation: James S. Reynolds, who was then the Chief of the Terrorism and Violent Crime Section of the United States Department of Justice, and Dale L. Watson, the FBI's Executive Assistant Director for Counterterrorism. See Pet. App. 106a-122a (Reynolds Decl.), 123a-127a (Supplemental Declaration of James S. Reynolds), 128a-138a (Watson Declaration). As relevant here, those declarations explain that release of the withheld information "could result in significant harm to the interests of the United States and compromise the September 11 and other ongoing terrorism-related investigations," *id.* at 111a, because it would effectively provide terrorist organizations with a roadmap of the government's terrorism investigation, *id.* at 112a, 125a. In particular, the declarations explain that releasing the requested information (i) would "undermine the ability of the

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[1] The basic prohibition against disclosure in Rule 6(e) was enacted into positive law by Congress, see Pub. L. No. 95-78, § 2(a), 91 Stat. 319, and thus qualifies as a statute barring disclosure for purposes of FOIA Exemption 3. See *Fund for Constitutional Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 867-868 (D.C. Cir. 1981).

United States to obtain cooperation from knowledgeable witnesses," and could thereby "pave the way for additional terrorist activities," *id.* at 111a; (ii) could lead to the premature public identification "of individuals associated with [the detainees], other investigative sources, and potential witnesses," *ibid.*; (iii) could make the detainees vulnerable to "intimidation or harm" by terrorist groups or others, "thereby discouraging or preventing them from supplying valuable information or further leads," *id.* at 111a-112a; (iv) could cause terrorist organizations to alter or cease their interactions with released individuals, thereby "eliminat[ing] valuable sources of information" and "impair[ing] the government's ability to infiltrate terrorist organizations," *id.* at 112a; (v) "would reveal the direction and progress of the investigation by identifying where [the government] is focusing its efforts," and causing terrorists to "alter their plans in a way that presents an even greater threat to the United States," *ibid.*, and (vi) "could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence," *id.* at 113a. Just as importantly, the comprehensive disclosure sought by petitioners would reveal to terrorists which persons the government has *not* detained and where and when arrests have *not* been made. *Id.* at 125a, 133a. Finally, the declarations explained that the investigation "is fluid and evolving," so that "the significance of a given detainee may change over time." *Id.* at 125a.

The district court granted partial summary judgment in petitioners' favor. Pet. App. 64a-103a. The court found there was "no question" that the records qualified as law enforcement records, within the meaning of FOIA Exemption 7, and agreed that the investigation was ongoing. See *id.* at 75a n.8, 91a-92a. The court

nevertheless concluded that the names of the detainees did not fall within Exemption 7(A) because their release could not reasonably be expected to interfere with the ongoing enforcement proceedings. *Id.* at 75a-84a. In so holding, the court accorded the government's predictive judgments of harm no deference because, in the district court's view, such deference is appropriate only when the government seeks to protect information affecting the national security under FOIA Exemptions 1 and 3. *Id.* at 81a, 89a. The court further held that it could not properly consider the use that terrorist groups might make of the aggregate disclosure of information because, as a matter of law, such "mosaic" analyses of the national security and intelligence consequences of disclosure are not cognizable under Exemption 7(A). *Id.* at 82a-83a.[2]

The district court agreed with the government, however, that the dates and locations of arrest, detention, and release were properly withheld under Exemption 7(A), because disclosure of that information "would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy" and would make detention facilities "vulnerable to retaliatory attacks." Pet. App. 91a. Finally, the court rejected petitioners' arguments that the First Amendment and the common law entitle them to the requested information. *Id.* at 97a-100a.

5. a. The court of appeals reversed in part, affirmed in part, and remanded with instructions to dismiss the case. Pet. App. 1a-63a. The court held that Exemption 7(A) authorizes the withholding of all of the requested information, and it therefore did not address the other

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[2] The district court also rejected the government's reliance on Exemptions 3, 7(C), and 7(F). Pet. App. 84a-89a.

exemption claims. *Id.* at 12a. As an initial matter, the court agreed with the district court that the names of the detainees were "compiled for the 'law enforcement purpose' of successfully prosecuting the terrorism investigation." Pet. App. 13a-14a.

The court of appeals then held (Pet. App. 14a) that disclosure of the names would be "reasonably likely to interfere with enforcement proceedings." In so holding, the court recognized that "the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview." *Ibid.* (citing *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001)). That is because Exemption 7(A) calls for "a predictive judgment of the harm that will result from disclosure of information," and, in the context of this case, "the government's top counterterrorism officials are well-suited to make this predictive judgment," while the judiciary "is in an extremely poor position to second-guess" it. Pet. App. 17a.

The court of appeals further recognized that "the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable." Pet. App. 17a. The court explained that a "complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite picture of the government investigation," and thus "would inform terrorists of both the substantive and geographic focus of the investigation." *Ibid.* In addition, by informing terrorists "which of their members were compromised by the investigation, and which were not," release of the information "could allow terrorists to better evade the ongoing investi-

gation and more easily formulate or revise counter-efforts." *Id.* at 18a. The court also reasoned that disclosure could be expected to "deter or hinder cooperation by detainees." *Id.* at 19a. Lastly, the court affirmed the district court's rejection of petitioners' First Amendment and common law arguments. *Id.* at 27a- 32a.

b. Judge Tatel dissented. Pet. App. 35a-63a. He would have held that the declarations submitted by the government were insufficient to sustain the invocation of Exemption 7(A), *id.* at 39a, because those declarations did not establish that all of those detained during the terrorism investigation in fact have links to terrorism, *id.* at 43a. Judge Tatel would have remanded for the government to submit more particularized explanations of the bases for withholding, *id.* at 62a.

ARGUMENT

1. *The Court Of Appeals Applied Settled Principles Of Law Under FOIA Exemption 7(A).* Petitioners do not dispute that their request seeks "law enforcement records," within the meaning of FOIA Exemption 7(A). Nor do they dispute that the investigation to which the law enforcement records pertain is ongoing and implicates, as even the dissent acknowledged (Pet. App. 35a), "uniquely compelling governmental interests." The narrow question resolved by the court of appeals thus was simply whether disclosure of a comprehensive list of individuals interviewed and then detained by investigators in connection with the ongoing terrorism investigation "could reasonably be expected to inter-

fere" with that investigation, 5 U.S.C. 552(b)(7)(A), based on the particular declarations filed in this case.[3]

In any ongoing law enforcement investigation, requiring the police to open their investigative files and provide a comprehensive list of the persons interviewed and detained—and, by the same token, to reveal which persons they have not interviewed and detained—would necessarily interfere with the investigation by providing a roadmap of law enforcement's activities, strategies, and methods. Furthermore, disclosure of such a list could reasonably be expected to expose the identified individuals to harassment and intimidation and could destroy any ongoing intelligence value they might have. Indeed, were a comparable FOIA request to be submitted by gang members or the head of an organized crime family, the harm that would be occasioned by disclosing a comprehensive list of persons

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[3] Petitioners' repeated claim (Pet. 1, 16, 17, 25) that the court of appeals' decision somehow ratified "secret arrests" overlooks that this is a FOIA case, not a habeas corpus case, and that *every* individual detained has had the opportunity for all of the judicial review of his detention and other legal issues that federal law and the Constitution require, and also was free to talk to the press or public. Pet. App. 3a-4a. Any secrecy surrounding the arrests is thus the product of private choice, not governmental dictate. The fact that most individuals have elected to preserve their privacy provides no basis for requiring the government to open its files in an ongoing law enforcement investigation to scrutiny not just by petitioners, but by the very targets of that investigation. Moreover, the government's handling of the INS detentions has already been exhaustively evaluated in a publicly released report by the Department of Justice's Inspector General. See Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003).

interviewed and detained as part of an ongoing investigation into gang activities or organized crime would be self-evident and would be at the core of what Exemption 7(A) is designed to protect. See, *e.g.*, *Manna* v. *Department of Justice*, 51 F.3d 1158, 1165 (3d Cir.) (Exemption 7(A) protects against disclosure of the "names of interviewees, informants, witnesses, victims and law enforcement personnel" involved in an investigation of the Genovese crime family), cert. denied, 516 U.S. 975 (1995); see also *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978) ("[T]he release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding was precisely the kind of interference that Congress continued to want to protect against.").

The court of appeals applied that same straightforward analysis to the government's ongoing investigation into the September 11th attacks and related terrorist threats. And it reached the same conclusion: disclosing a list of individuals interviewed and detained —which simultaneously identifies for terrorist organizations those persons who have *not* been interviewed and detained—"could reasonably be expected to interfere" with the ongoing investigation.

Petitioners repeatedly object (Pet. 19, 23-24) that the government's analysis of the threat posed to its investigation was not sufficiently particularized. That record-bound argument overlooks this Court's controlling precedent applying Exemption 7(A). In *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*—a case that is not cited or discussed anywhere in the petition—this Court held that the government may invoke FOIA Exemption 7(A) to protect against interference with law enforcement proceedings without making the type of page-by-page or document-by-document showing required to

invoke other FOIA exemptions. Rather, under Exemption 7(A), "certain generic determinations might be made." 437 U.S. at 224; see also *id.* at 236 (similar). The Court deemed such an approach to be necessary to protect against premature disclosure of the government's investigative or litigation strategy and, more particularly, "to prevent harm [to] the Government's case in court," *id.* at 224 (internal quotation marks and citations omitted); to prevent litigants from obtaining "earlier and greater access" to government investigatory files than they "would otherwise have," *id.* at 241; and to protect prospective witnesses and those cooperating with the government from harassment and intimidation, *id.* at 239-240.

A list of persons interviewed in an ongoing criminal investigation merits the same categorical protection accorded witness statements in *Robbins Tire.* For criminal investigations—especially ones involving grave, ongoing threats to the national security, intelligence operations, and sophisticated international crimes—disclosure of interview lists "would generally 'interfere with enforcement proceedings,'" 437 U.S. at 236, by prematurely revealing the government's investigative strategies, tactics, and focus, and also by opening the contacted individuals to coercion, intimidation, and unwanted exposure.

That conclusion is reinforced by amendments to Exemption 7(A) that Congress has enacted since *Robbins Tire* was decided. At the time of the Court's decision in *Robbins Tire*, Exemption 7(A) applied to law enforcement records where release "would * * * interfere with enforcement proceedings." 437 U.S. at 223. The subsequent enactment of the Freedom of Information Reform Act of 1986 (Reform Act), Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48, reinforced the

validity of a categorical, pragmatic approach to applying Exemption 7(A). The Reform Act amended Exemption 7(A) to cover law enforcement records the release of which "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A), thereby easing the government's burden. As the legislative history explains, that change "recognizes the lack of certainty in attempting to predict harm," and thus requires only "a standard of reasonableness in that process, based on an objective test." S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983); see *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 778 n.22 (1989) (explaining that the parallel amendment to Exemption 7(C) "amply supports a categorical approach to the balance of private and public interests" under that exemption).[4] Under the categorical approach permitted by Exemption 7(A), the agency satisfies its burden of justifying withholding if it "trace[s] a rational link" between the nature of the requested documents and the interference with enforcement proceedings that could be expected to result from disclosure. *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986)

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[4] The courts of appeals have repeatedly recognized that the Reform Act effectively broadened the coverage of Exemption 7(A) and reinforced the need for a pragmatic approach. See, *e.g.*, *Manna*, 51 F.3d at 1164 n.5 (Congress amended Exemption 7(A) to "relax significantly the standard for demonstrating interference"); *Alyeska Pipeline Serv. Co.* v. *EPA*, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (trial court, in relying on pre-amendment version of Exemption 7(A), improperly "required EPA to meet a higher standard than FOIA now demands"); *Curran* v. *Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease—rather than to increase—the government's burden in respect to Exemption 7(A).").

(R.B. Ginsburg, J.). The government amply satisfied that burden in this case.

2. *The Court Of Appeals Correctly Upheld Withholding Of The Particular Records At Issue.* In the face of the court of appeals' adherence to and application of traditional Exemption 7(A) principles, petitioners do not argue that this Court's review is necessary to resolve an inter-circuit conflict pertaining to the operation of Exemption 7(A). There is none. To the contrary, the court of appeals' decision here parallels the Third Circuit's decision in *Manna*, which likewise sustained the withholding under Exemption 7(A) of a list of persons interviewed as part of an investigation into a "violent and retaliatory" criminal organization, the Genovese crime family. *Manna*, 51 F.3d at 1165.

Petitioners, instead, seek this Court's review because they disagree (Pet. 18-25) with the court of appeals' application of settled Exemption 7(A) law in the particular circumstances of this case. Petitioners' record-bound disagreement with the application of a FOIA exemption in one particular case, however, is not the type of issue that merits an exercise of this Court's certiorari jurisdiction. That is especially so because the information petitioners seek to have disclosed to the public in this case is independently protected from disclosure by Exemptions 7(C) and 7(F) and, for the information pertaining to material witnesses, by Exemption 3.

In any event, there is no merit to petitioners' objections to the court's conclusion that the declarations submitted by the government justified withholding under Exemption 7(A). Those declarations plainly "trace a rational link," *Crooker*, 789 F.2d at 67, between the nature of the records that petitioners seek

to have made public and the harm to the ongoing criminal investigation and to the national security that production could occasion.

a. Petitioners first contend (Pet. 18-20) that the court of appeals erred in according a degree of deference to the government's assessment of the harm to national security that premature disclosure of the investigative information would entail. Indeed, petitioners question (Pet. 18) whether any deference is appropriate at all under Exemption 7(A), suggesting (as did the dissenting judge in the court of appeals, Pet. App. 38a-39a) that such deference is appropriate only when the government invokes the FOIA exemptions for classified information (Exemption 1) or intelligence information (under Exemption 3). That argument is meritless. The deference accorded the Executive Branch's judgments concerning matters of national security, foreign intelligence operations, and the operations of international terrorist organizations is not based on the particular FOIA exemption at issue or the text of Exemptions 1 and 3. Rather, such deference is compelled by the Constitution's separation of powers:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to

> belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); accord *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001) ("terrorism or other special circumstances" may warrant "heightened deference to the judgments of the political branches"); *CIA* v. *Sims*, 471 U.S. 159, 176 (1985) (the Constitution assigns to the Executive the "complex political [and] historical" judgments that underlie intelligence judgments, because judges "have little or no background in the delicate business of intelligence gathering").

As the court of appeals explained, in any Exemption 7(A) case, application of the exemption "explicitly requires a predictive judgment of the harm that will result from disclosure of information, permitting withholding when it 'could reasonably be expected' that the harm will result." Pet. App. 17a (quoting 5 U.S.C. 552(b)(7)(A)). As the court of appeals further explained, in the context of the present investigation, "[i]t is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment," and, "[c]onversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." *Ibid.* Neither petitioners nor the dissenting opinion below explains why the Executive's ability to trace a rational link between disclosure of law enforcement records and the resulting harm is somehow diminished, and the Judiciary's relative aptitude to assess whether release of such information would undermine an ongoing terrorism investigation is somehow enhanced, simply because this case involves *both* vital national security

and intelligence concerns *and* an ongoing law enforcement operation.

b. Petitioners argue secondly that the court of appeals should have distinguished between "innocent" (Pet. App. 22a-23a) detainees and those actually charged with terrorism-related offenses. Again, even assuming that such record-bound arguments would warrant an exercise of this Court's certiorari jurisdiction, that argument fails to come to grips with the basis for Exemption 7(A)'s application here. That exemption applies because petitioners seek quintessential and acutely sensitive investigative information—a list of those persons who have and, by implication, those who have not been interviewed and detained in an ongoing criminal probe. As with many criminal investigations, the value and sensitivity of that information is not limited by whether particular interviewees themselves are suspected of committing crimes or with the content of the information they provide, the significance of which can change as the investigation proceeds.

Moreover, the fact that a particular individual has not been formally charged in immigration or criminal proceedings with terrorism-related activities does not mean that he is "innocent" or that he had no connection to or information concerning terrorist groups. For example, when an alien suspected of terrorist activities is also unlawfully present in the United States, he can be readily removed on the basis of his unlawful presence alone, without risking the harms to the ongoing investigation and sensitive intelligence matters that might result from seeking to establish terrorism-related grounds for his removal as well.

c. Petitioners assert (Pet. 21) that the government's rationale is undercut by the fact that those interviewed and detained are themselves free to disclose their

status to the public. Again, that argument misses the point. In the first place, in virtually any law enforcement investigation, persons who have been questioned are free to disclose their individual involvement. But that has never been thought to bar a federal law enforcement agency from invoking Exemption 7(A) to prevent such information from being disclosed or publicly confirmed by the government.

Moreover, in the present case, there is a significant qualitative difference in the value to international terrorists of, on the one hand, isolated self-identification by a few individuals who have been interviewed and detained, and, on the other hand, an official and comprehensive listing by the government of all individuals it has interviewed and detained. Even if, in fact, every individual chose to identify himself publicly, international terrorists would have no way of knowing whether everyone had come forward unless and until the government provided official confirmation. Thus, petitioners are simply wrong in contending (Pet. 21) that "the detainees themselves could bring about most or all of the harms cited." In reality, only a few individuals have chosen to publicize their detention in connection with the terrorism investigation. As the court of appeals noted (Pet. App. 21a), that fact provides implicit practical confirmation of the concerns for retaliation, harassment, and privacy identified in the declarations as grounds for withholding the names and related information that petitioners insist must be made public.

Indeed, because of those concerns, the information petitioners seek was also withheld on the basis of Exemption 7(C), which protects law enforcement records the production of which "could reasonably be expected to constitute an unwarranted invasion of personal

privacy," and Exemption 7(F), which applies where release "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7)(C) and (F). "Numerous courts of appeals have recognized that individuals involved in a criminal investigation—including suspects, witnesses, interviewees, and investigators—possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation." *Landano* v. *Department of Justice*, 956 F.2d 422, 426 (3d Cir. 1992) (citing cases), vacated on other grounds, 508 U.S. 165 (1993).[5] That interest is especially strong in connection with the investigation arising out of the September 11 terrorist attacks. And with respect to Exemption 7(F), the concern for "endanger[ing] the life or physical safety of any individual" applies not only to the interviewees themselves, but also to persons who would be harmed by any future terrorist activity that could be caused by the release of investigative information. Although the court of appeals found it unnecessary to consider the applicability of those additional exemptions (or Exemption 3) because of its ruling that all of the requested information is protected by Exemption 7(A), those exemptions provide independent grounds for withholding the information that petitioners seek and therefore would furnish alternative grounds for affirmance of the judgment below.

d. Lastly, petitioners argue (Pet. 21-22) that the declarations are flawed because the government has released some information about a few detainees. That

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[5] See *Neely* v. *FBI*, 208 F.3d 461, 464-465 (4th Cir. 2000); *Manna*, 51 F.3d at 1166; *Burge* v. *Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991); *Fitzgibbon* v. *CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990).

argument "overlooks the political realities of intelligence operations in which, among other things, our Government may choose to release information deliberately to 'send a message' to allies or adversaries." *Sims*, 471 U.S. at 180. In any event, as the court of appeals explained (Pet. App. 22a), "[t]he disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation." Nothing in FOIA makes governmental openness an all-or-nothing proposition, and it would be perverse to construe the statute to punish the government for making those disclosures that were consonant with its ongoing national security and law enforcement interests.

3. *Petitioners' First Amendment Claim Does Not Merit Review.* Petitioners also seek this Court's review (Pet. 25-30) of their claim that the First Amendment mandates disclosure of the requested information. That claim was rejected by both the district court (Pet. App. 97a-99a) and the court of appeals (*id.* at 28a-32a). Petitioners identify no conflict in the circuits on that question. Nor does the court of appeals' ruling conflict with any decision of this Court. Quite the contrary, the Court has made clear that the First Amendment does not "mandat[e] a right of access to government information or sources of information within the government's control." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion of Burger, C.J.). "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 14. Indeed, the court of appeals' decision wholly accords with this Court's acknowledgment that the government "could decide not to give out arrestee information at all without violating the First Amendment." *Los Angeles*

Police Dep't v. *United Reporting Publ'g Co.*, 528 U.S. 32, 40 (1999).

To be sure, this Court has held that there is a First Amendment right of access to criminal trial proceedings. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). But the Court based that conclusion on a 1000-year "unbroken, uncontradicted history" of public access to criminal trials and a tradition in which public access was thought to "inhere[] in the very nature of a criminal trial." *Id.* at 573; see *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 8 (1986) (elaborating on the "right of access to criminal proceedings"). That rationale does not apply to proceedings in the Executive Branch, much less to Executive Branch *records*. To the extent petitioners argue otherwise, this Court recently denied certiorari on a First Amendment claim of access to Executive Branch proceedings. *North Jersey Media Group* v. *Ashcroft*, 123 S. Ct. 2215 (2003) (petition asserted First Amendment right of access to removal proceedings for aliens of special interest to the September 11th terrorism investigation). That same disposition is appropriate for petitioners' claim of a First Amendment right of access to government records.[6]

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[6] Because the decision below concerns the right of access to background *investigatory records*, as opposed to judicial or administrative *adjudications*, the court of appeals' decision does not conflict with *Detroit Free Press* v. *Ashcroft*, 303 F.3d 681 (6th Cir. 2002). See Pet. App. 32a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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